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In The

Supreme Court of the United States

October Term, 1997

RANDON BRAGDON, D.M.D.,

Petitioner,

v.

SIDNEY ABBOTT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE *AMICUS CURIAE* THE AMERICAN DENTAL ASSOCIATION IN SUPPORT OF PETITIONER RANDON BRAGDON, D.M.D.

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INTEREST OF THE AMICUS

The AMERICAN DENTAL ASSOCIATION (the "Association"), an Illinois not-for-profit corporation founded in 1859, is the leading dental association in the United States with over 140,000 member dentists representing approximately 75% of this nation's active licensed dentists.[1] The stated object of the Association, as set forth in its Constitution, is to "encourage the improvement of the health of the public and to promote the art and science of dentistry." The Association has a vital interest in matters which affect the oral health of the public, and a long record of educating dentists and the public about HIV/AIDS and the safety of the dental office.

This brief seeks to begin to clarify the application of what is, to many dentists and other health care providers, an ambiguous federal law, the Americans with Disabilities Act (the "Act"). We applaud this Court for agreeing to address two key questions pertaining to the Act's "disability" definition, so we can give appropriate guidance to our members, who can in turn use this information when treating the American public. We note at the outset that this brief does not in any way challenge or undermine long-standing Association policy concerning the safety of the dental office and/or the treatment of HIV-infected individuals;[2] nor does it challenge whether someone who exhibits symptoms of HIV, including AIDS, is "disabled."

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[1] No counsel for a party authored any part of this amicus curiae brief, and no person or entity other than the amicus curiae made a monetary contribution to the preparation or submission of this brief. (Rule 37.6 of the Supreme Court of the United States.)

[2] As set forth in our amicus curiae brief below, the Association stands by its self-explanatory, cornerstone policies that (1) HIV-individuals should be treated with compassion and dignity, (2) there is little risk of

All parties have consented to the filing of this Brief, as reflected in the consent letters separately submitted to this Court. Pursuant to the Court's rules, the Brief brings to the attention of the Court relevant matter, from the perspective of America's leading dental association, not already brought to the Court's attention by the Petitioner. (Rule 37.1 of the Supreme Court of the United States.) Every effort has been made to avoid or minimize duplication with Petitioner's brief.

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transmission of HIV through dental treatment if recommended infection control procedures are routinely followed, (3) patients with HIV infection may be safely treated in private dental offices when appropriate infection control procedures are employed, (4) such infection control procedures provide protection both for patients and dental personnel, and (5) a decision not to provide treatment to an individual because the individual has AIDS or is HIV seropositive, based solely on that fact, is unethical. American Dental Association's Policy Statement on AIDS, HIV Infection and the Practice of Dentistry (1988:457; 1991:591), Appendix at 273; ADA Principles of Ethics and Code of Professional Conduct, Section 1-A, Patient Selection, Advisory Opinion 1 (1988), Appendix at 276. In addition, after the filing of our brief below, the Association established policies Efficacy of Universal Precautions and Policy Statement on HIV/AIDS as an Infectious and Communicable Disease providing, inter alia, that (6) based on current scientific and epidemiological data, universal precautions continue to be an effective means of reducing blood contacts that can result in disease transmission, minimizing even further the already low risk of bloodborne disease transmission in the dental office, (7) given that data, patients with bloodborne diseases may be treated in the private dental office with no significant risk of disease transmission, provided appropriate infection control procedures are employed and (8) in Association communications on this issue, members be reminded that a patient's HIV/AIDS status is not a justification for refusal of treatment (1996: 734-735).

SUMMARY OF ARGUMENT

In the instant case, Respondent is an asymptomatic HIV-infected woman, whose claim of "disability" was based solely on her asserted inability to reproduce. To help clarify the legal obligations of health care providers in such situations, the Association asked this Court to address two aspects of the Americans with Disabilities Act's "disability" definition.

The Act defines "disability," in relevant part, as a "physical or mental impairment that substantially limits one or more of the major life activities" of the individual in question. 42 U.S.C. § 12102(2)(A) (1993). The Association believes that whether any particular plaintiff is disabled under the Act requires an individualized application of a not explicitly defined legal standard as to what constitutes both a major life activity and a substantial limitation of that activity.

The Association urges the Court to: (1) resolve a split in the federal appeals courts by holding "reproduction" is not a "major life activity" under the Act and (2) determine that the Act does not confer *per se* disability status on any condition, including HIV. On the first question, "reproduction" is unlike the activities listed in the regulations describing "major life activities," and outside of the protections offered by the Act. On the second question, it is of paramount importance that this Court exercise great care before adopting a *per se* rule, the implementation of which would be tantamount to a sea change of more than 20 years of case law decided since the passage of the Rehabilitation Act, in which federal courts have properly made individualized assessments of plaintiffs' claims of "handicap" or "disability."

While this brief addresses these two questions in the order accepted for review by this Court, we suggest that the Court treat them in reverse order. Following the agreed course set by every circuit court that has addressed this issue, we believe the Court should first determine that whether any condition or disease constitutes a "disability" under the Act must be assessed on a case-by-case basis. This would mean there is no *per se* rule for HIV/AIDS – a perfectly reasonable outcome given the plain language of the Act, especially in light of treatments for HIV-disease that have recently been developed. Only then is there need to address the second question, on which we urge the Court to hold that "reproduction" is not a "major life activity."

Because the Association urges this Court to resolve this case by ruling in Dr. Bragdon's favor on either or both of the two issues pertaining to the Act's "disability" definition, we do not reach the third question presented for the Court's review.

ARGUMENT

This brief addresses the first two questions accepted for review by this Court pertaining to the Americans with Disabilities Act's definition of "disability." However, we suggest that the Court treat them in reverse order. The starting point should be one on which the circuit courts of appeal agree: the plain language of the Act militates against finding conditions to be *per se* disabilities and instead compels a case-by-case determination of whether a given individual is disabled. Ennis v. National Ass'n of Business and Educ. Radio, Inc., 53 F.3d 55, 59-60 (4th Cir. 1995)(HIV-disease not a *per se* disability). Accord, Abbott v. Bragdon, 107 F.3d 934, 941 (1st Cir. 1997) and Runnebaum v. Nationsbank of Maryland, N.A., 123 F.3d

156, 166 (4th Cir. 1997) (employee with HIV-disease not disabled), citing, Homeyer v. Stanley Tulchin Assocs., Inc., 91 F.3d. 959, 962 (7th Cir.1996) and Katz v. City Metal Co., 87 F. 3d 26, 32 (1st Cir.1996) for the proposition that "a determination of disability must be made on an individualized, case-by-case basis."

Rejecting a *per se* disability rule for HIV/AIDS is a perfectly reasonable outcome, especially given the plain language of the statute and in light of treatments for HIV-disease that have recently been developed. Moreover, only after rejecting a *per se* rule is there need to address the second question, on which we urge the Court to hold that "reproduction" is not a "major life activity" under the Act.

While we suggest that the Court consider the first two questions presented for review in reverse order, we take them up below in the order accepted by the Court for review.

I. This Court Should Resolve The Split In The Circuits And Determine That "Reproduction" Is Not A "Major Life Activity" Under The Americans With Disabilities Act

Some persons with asymptomatic HIV-disease, such as Respondent Ms. Abbott, have claimed "disability" status under the Act based on their position that their ability to reproduce is substantially limited by their HIV infection.[3] The Association urges this Court to hold that "reproduction" is not a "major life activity" under the Act. Had Congress wanted the Act to require health care providers to treat persons with asymptomatic HIV-disease

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[3] Respondent's position is based on her "decision" not to reproduce (Abbott, 107 F.3d. at 942), as opposed to her physical ability to do so.

when their sole claim of actual disability is based on an asserted inability to reproduce, it could have expressly done so.

The plain language of the Act does not define what constitutes a "major life activity." The applicable regulations state that "major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 36.104(2) (1995). While the use of the words "such as" indicates that this list is illustrative rather than exhaustive, reproduction is unlike the specifically enumerated items on the list.

At least two federal appeals courts have rejected the argument that reproduction is a "major life activity." The court in Zatarain v. WDSU-Television, Inc., 881 F.Supp. 240, 243 (E.D.La. 1995), aff'd, per curium, 79 F.3d 1143 (5th Cir. 1996) reasoned that reproduction is not an activity engaged in with the same degree of frequency as the illustrative list of activities in the regulations and therefore treating reproduction as a major life activity under the Act would be a conscious expansion of the law beyond the province of the court. As set forth in the district court opinion:

> "Reproduction is not an activity engaged in with the same degree of frequency as the listed activities... A person is required to walk, see, learn, speak, breath [sic], and work throughout the day, day in and day out. However, a person is not called upon to reproduce throughout the day, every day. This court cannot reasonably infer that reproduction is a `major life activity' based on an analysis of the illustrative list of activities in the regulation. Treating reproduction as a major life activity under the ADA would be a conscious expansion of the law, which is beyond the province of this Court."

Id. at 243. The court in Krauel v. Iowa Methodist Medical Center, 95 F.3d 674, 677 (8th Cir. 1996) likewise held that reproduction is not a "major life activity," agreeing with the Zatarain position that to treat reproduction as a major life activity under the ADA would be inconsistent with the illustrative list of activities in the regulations and a considerable stretch of federal law.

By concluding that reproduction is a "major life activity" under the Act, the court in Abbott, 107 F.3d at 941, is in direct conflict with the above mentioned federal appeals court decisions. The Abbott court believed that reproduction "fits comfortably" within the sweep of the non-exclusive list of functions in the regulations. Id. at 940. However, the circuit split reflects that there is certainly no comfortable fit. Further, the Abbott court's disagreement with Krauel and Zatarain is questionable. True, neither lack of frequency nor lack of universality diminishes the importance of conceiving, childbearing and raising a family. But reproduction is simply not engaged in with the same frequency or universality as the listed functions. Further, while not each and every one of the activities enumerated in the regulations is engaged in by 100% of the population (Id. at 941), their inclusion in the list of "major life activities" is not a basis to expand the list by judicial fiat.

Other cases holding that reproduction is a "major life activity" are also unpersuasive. For example, the court in Pacourek v. Inland Steel Co., Inc., 916 F. Supp. 797, 804 (N.D.Ill. 1996) held that reproduction is a "major life

activity" because, inter alia, "[m]any, if not most, people would consider having a child to be one of life's most significant moments and greatest achievements, and the inability to do so, one of life's greatest disappointments" (emphasis added). However, the items on the regulatory list of "major life activities" are necessary parts of living for virtually everyone, not life "achievements." Taken to its illogical extreme, does Pacourek suggest that all Americans without children are disabled? What about those who cannot have them biologically but nevertheless are able to adopt? And what about people who simply do not accomplish other possible achievements that they might dream about? Are they disabled, too?[4]

Failing to find support in the statute or the regulations for the proposition that reproduction is a "major life activity" under the Act, some courts have examined legislative history. E.g., Abbott, 107 F.3d at 940. However, this Court has counseled that legislative history is often "highly unreliable" and "hazardous at best." Board of Educ. v. Mergens, 496 U.S. 226, 242 (1990). Indeed, this Court has refused to follow legislative history where it "is in no way anchored in the text of the statute." Shannon v. U.S., 512 U.S. 573, 583 (1994). See also, Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 617 (1991) (Scalia J.,

[4] Another of the cases relied on by the trial court reached a decision on an admittedly "thin" record. Doe v. Kohn Nast & Graf, P.C., 862 F.Supp. 1310, 1318-20 (E.D.Pa. 1994). Interestingly, the Doe court observed that the definition of "disability" for purposes of the Act is different than the one a lay person might give to the word; the Pacourek court might have been more mindful of this distinction when including "achievements" within the construct of "major life activities."

concurring) (legislative history is "unreliable...as a genuine indicator of congressional intent").

For the reasons set forth above, the Association urges this Court to determine that "reproduction" is not a "major life activity" under the Americans With Disabilities Act. "Reproduction" is unlike the activities listed in the regulations describing "major life activities." Thus, one whose only contention is that she "decided" not to have children is outside of the protections offered by the Act.

II. This Court Should Determine That The Americans With Disabilities Act Does Not Allow For Disability *Per se* Treatment Of Any Condition, Including HIV Disease

A. The Act Requires An Individualized Assessment of "Disability" for All Conditions

It appears that this case is the first the Court will hear on whether any particular condition, including HIV disease, constitutes a "disability" under the Americans with Disabilities Act. Especially in this context, the Association urges the Court not to single out any condition for *per se* disability treatment. Doing so would arguably represent a sea change in more than 20 years of case law since the passage of the substantially similar definition contained in the Rehabilitation Act.[5]

[5] The definition of "disability" in the ADA mirrors that of the term "handicap" in the Rehabilitation Act of 1973, 29 U.S.C. 701-96. The two terms have been interpreted identically. Pacourek, 916 F.Supp. 797, 801 (N.D.Ill. 1996). The courts look to case law interpreting both statutes when analyzing plaintiff's evidence of "disability." See, Nedder v. Rivier College, 944 F.Supp. 111, 115 n. 5. (D.N.H. 1996). As set forth more fully below, courts applying the Rehabilitation Act definition have routinely engaged in individualized determinations

The Association urges this Court to embrace the general approach agreed to by other circuit courts of appeal outside of the HIV/AIDS arena, requiring that "a determination of disability must be made on an individualized, case-by-case basis." Homeyer v. Stanley Tulchin Assocs., Inc., 91 F.3d. 959, 962 (7th Cir.1996); Katz v. City Metal Co., 87 F. 3d 26, 32 (1st Cir.1996). The Fourth Circuit has taken the lead in applying this approach in the context of HIV/AIDS (Ennis, 53 F.3d at 59-60) (plain language of the Act militates against finding HIV-disease to be a *per se* disability), recently holding that an asymptomatic HIV-infected employee was not disabled under the Act. Runnebaum, 123 F.3d at 166. On its face, the First Circuit took a similar approach in the instant case, rejecting a *per se* standard and instead exploring whether Respondent could prove that she satisfied the Act's disability definition. Abbott, 107 F.3d at 939.

The Association urges this Court to reject calls for a *per se* disability rule for any condition. Some decisions, like the First Circuit's in the instant case, come dangerously close to the adoption of such a standard.[6] Had Congress expressly

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regarding "handicap," including this Court in its landmark decision School Board of Nassau County, Florida v. Arline 480 U.S. 273 (1987), regarding another infectious disease, tuberculosis.

[6] In amending its original decision, the First Circuit highlighted that "Congress deemed HIV-infected individuals to be disabled under the ADA," quoting from the Act's legislative history that reflected "[p]ersons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under the first test of the definition...[and] a person infected with [HIV] is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships." Abbott, 107 F.3d at 942-43. According to the Court,

sought to single HIV/AIDS out for special consideration, that would be one thing. But Congress did not. Rather, in framing the Americans with Disabilities Act, Congress relied upon a definition borrowed from the Rehabilitation Act, passed long before the advent of the AIDS epidemic.[7] Courts applying the definitions have routinely inquired into the facts in the record regarding a plaintiff's alleged disability, rather than carving out *per se* disability status for any condition. See, e.g., Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986); Byrne v. Board of Education, 979 F.2d 560, 564 (7th Cir. 1992).

Like the Rehabilitation Act before it, the Americans with Disabilities Act's statutory definition does not enumerate a list of disabilities, but instead characterizes "disability," in relevant part, as a "physical or mental impairment that substantially limits one or more of the major life activities" of the individual in question. 42 U.S.C. § 12102(2)(A). Accordingly, whether any particular plaintiff is disabled under the Act requires an individualized application of a not explicitly defined legal standard as to what constitutes both a major life activity and a substantial limitation of that activity. Indeed, the plain language of the Act militates against finding HIV disease to be a disability *per se* and compels a case-by-case determination of whether a given individual is disabled by HIV/AIDS. Ennis, 53 F.3d at 59-60. As set forth above, the courts of appeals considering this issue agree that findings of disability must be made on a case-by-case basis. Supra at pp.4 and 5.

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the "legislative history thus independently bolsters our conviction that Ms. Abbott is disabled under the ADA." Id. In point of fact, however, this added language risks tilting all other courts towards a *per se* rule for HIV.

[7] H.R. Rep. No. 485, Part 2, 101st Cong., 2nd Sess., 50 (1990).

Adopting a *per se* disability rule could allow for end runs around the Act's clear requirement of individualized assessments. It also risks eviscerating key elements of the Act's "disability" definition, such as whether a particular plaintiff with a given impairment is substantially limited in a major life activity . For example, some courts have held that cancer is a disability, Mark v. The Burke Rehabilitation Hospital, 1997 WL 189124 (S.D.N.Y. 1997); some courts have held it is not. Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996). Appropriately, courts on both sides have examined the facts of a particular case and eschewed the application of a *per se* rule.

The adoption of a *per se* rule could also risk the judiciary riding roughshod over matters that are best handled by triers of fact. Moreover, numerous decisions under both the Americans with Disabilities and Rehabilitation Acts have denied summary judgment and sent the issue of disability to the jury, often because the record did not resolve all issues of material fact as to whether the claimed impairment substantially limited an established major life activity. See, e.g., Hendry v. GTE No., Inc., 896 F.Supp. 816, 824-825 (N.D.Ind. 1995) (intermittent migraine headaches); Smith v. Kitterman, Inc., 897 F.Supp. 423, 427-28 (W.D.Mo. 1995) (carpal tunnel syndrome); Braverman v. Penobscot Shoe Co., 859 F.Supp. 596, 603 (D.Me. 1994) (cancer); Pridemore v. Legal Aid Society, 625 F.Supp. 1171, 1176 (S.D.Ohio 1985) (mild cerebral palsy, mental illness).

The Association is mindful that the rejection of a *per se* disability standard could lead to what may be viewed as harsh results, but the solution here would be a legislative, not a judicial, one. True, lower courts are limiting the "disability" definition in ways that many might not agree with, and with respect to conditions that many might

otherwise presume to be *per se* disabling. But a proper reading of the Act calls for an individualized determination of "disability" based on the record in a given case. For example, in Ellison, supra at p.12, the Fifth Circuit affirmed a grant of summary judgment against a woman with breast cancer, holding that she was not disabled because, inter alia, the record did not create a material issue of fact regarding whether her cancer and treatment "substantially limited" her major life activity of working – notwithstanding the plaintiff's testimony that while "the radiation treatment made her nauseous and tired and she suffered an allergic reaction to the radiation which caused painful swelling and inflammation, the treatment did not effect her ability to do her job and she...was back to normal in three or four months." Id. at 191. Likewise, in Still v. Freeport-McMoran, Inc., 120 F.3d 50, 52 (5th Cir. 1997), the Fifth Circuit found that blindness in one eye did not constitute disability, in part because plaintiff's "contention is without record support," where plaintiff offered "no evidence that he [was] unable to engage in any usual activity because of his partial blindness." These cases understand that the Act requires an individualized determination of "disability," and thus avoid the application of a *per se* rule for any condition. Congress can enact legislation to the contrary if it sees fit.

The Association urges this Court to track its approach in its seminal case School Board of Nassau County v. Arline, 480 U.S. 273 (1987), in which the Court considered whether an individual with tuberculosis was "handicapped" as defined in the Rehabilitation Act. That act's definition of "handicap" is the precursor to the Americans with Disabilities Act's "disability," 29 U.S.C. § 706(8)(B) (1993), and also "contemplate[s] individualized assessments of whether a person qualifies as an 'individual with a disability.'" Torcasio v. Murray, 57 F.3d 1340, 1353 n.15 (4th Cir. 1995). The Arline Court specifically reserved the question

of whether "a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." Arline, 480 U.S. at 282, fn. 7. However, in determining whether one or more of plaintiff's major life activities were substantially limited by her tuberculosis, the Court looked to the fact that the she required hospitalization. Id. at 281. As set forth above, federal appeals courts since Arline have concluded that the question of who is a handicapped person under the Rehabilitation Act is best suited to a case-by-case determination. Supra at p.11. The same approach should continue to be carried over to cases now arising under the Americans with Disabilities Act.

B. Whether A Particular Plaintiff With HIV Has A "Disability" Requires An Individualized Determination

As noted above, the Fourth Circuit recently determined that an asypmtomatic HIV-infected individual was not disabled. In Runnebaum, 123 F.3d 156 (4th Cir. 1997), the Court properly undertook an individualized assessment of the plaintiff's alleged disability. Responding to amici's argument that Runnebaum's ability to procreate and engage in intimate sexual relations were substantially limited by his HIV-infection, the court determined that "asymptomatic HIV does not substantially limit procreation or intimate sexual relations for purposes of the ADA." Id. at 172. The court went on to specifically find "the record makes clear that Runnebaum's ability to engage in intimate sexual relations was not substantially limited by his HIV infection." Id. (emphasis added). See also, Cortes v. McDonald's Corp., et. al., 955 F.Supp. 541, 546 (E.D.N.C. 1996), holding that an asymptomatic HIV-infected employee of McDonald's was not disabled, in part because "according to

the record before the court, the plaintiff has failed to establish that he experienced any limitation at work, let alone a substantial limitation of a major life function."[8]

The Association urges the Court to reject the application of a disability *per se* rule to any condition, including HIV. Applying a blanket *per se* rule solely for diseases *de jour* can be confusing to the point that those charged with compliance, and the public in general, might genuinely loose confidence in the law, the lawmakers, and the courts that interpret the law. Laws must be consistently and fairly applied to instill public confidence, and compliance with the Act is likely to be optimized if it is applied consistently with respect to all diseases and conditions. Indeed, one of the Act's express purposes is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 1201(b)(2)(1993) (emphasis added).[9] The correct approach

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[8] In the instant case, the briefs below reflect the importance of looking to the record to determine whether a particular plaintiff has a "disability" under the Act, even in the case of asymptomatic HIV-infection. As set forth in our *amicus curiae* brief in the First Circuit, Respondent's contradictory deposition testimony could lead reasonable people to disagree as to whether her ability to reproduce was "substantially limited" by her asymptomatic HIV-infection. Of note is that the Department of Justice also relied on Respondent's deposition testimony, albeit to different ends, to support its position that she did have a "disability." In so doing, the Department of Justice arguably recognized that a disability *per se* approach is inconsistent with the plain language and intent of the Act.

[9] The Association urges that the Court consider going even a step further, by providing guidance to courts adopting rules that approximate *per se* standards. To emphasize that a determination of "disability" under the Act requires an individualized assessment, the Court might wish to level a slippery slope that at least one court, backing only slightly away from a *per se* rule, recently adopted. In

is to treat all conditions as subject to a case-by-case assessment of disability. The statute should not be read to accord *per se* disability treatment to HIV/AIDS alone, while subjecting all other diseases, such as cancer and blindness, to individualized assessments.

This Court should send a clear message that there are no "special" disabilities, and that all diseases and conditions will be judged by the same "disability" definition that was time tested long before the advent of HIV.[10] Doing so is necessary to assure that the law, as written, keeps up with scientific developments. Consider, for example, the advent of protease inhibitors and their miraculous impact on the lives of persons with HIV-disease. By the nature of this

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Hernandez v. Prudential Insurance Company of America, 977 F.Supp. 1160, 1165 (M.D.Fla. 1997), the court found that a plaintiff with asymptomatic HIV was disabled, based in part on its belief that his need for continued medical care demonstrated that he could not care for himself. This ruling begins the slippery slope because persons with many conditions need to visit their doctors, but that factor alone certainly does not mean they have a disability. The Hernandez court further relied on interpretive guidance indicating that impairments "such as HIV infection, are inherently substantially limiting." Id., citing 29 C.F.R. § 1630.2(j). Congress could have enacted similar language into law, but declined to do so, thus avoiding the slippery slope of rules approximating *per se* standards.

[10] The Association is mindful that some cases decided under the Rehabilitation Act could be viewed as approximating a *per se* standard for HIV-disease. It is not always clear that those cases involve asymptomatic HIV. Also, in some of the cases, the defense did not challenge whether HIV was a handicap. In others, the court presumed, with little or no analysis, that HIV disease constituted a handicap. None of these cases articulate a reasoned basis for abandoning the individualized inquiry required by the Rehabilitation Act, which is seemingly applied in all other cases arising under that Act not involving HIV.

scientific development, and the ability to reduce HIV RNA to undetectable levels in many cases, many persons once living with a death sentence may now have hope.[11] The First Circuit's opinion is predicated, in part, on the notion that Ms. Abbott could not reproduce; the court reached that determination based on a broad definition of reproduction, including that Ms. Abbott would not be alive long enough to mother a child.[12] The First Circuit purposefully limited its opinion to the facts of the case, recognizing that scientific developments might change how it resolved future cases.[13] The question must be asked: with the benefits of protease inhibitors, would a similarly situated woman prevail in the First Circuit today? The application of a *per se* rule would not allow this or other important questions to be asked, let alone answered. This Court should reject the application of a *per se* disability standard for any disability,

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[11] See, e.g., Carpenter, et al., Antiretrovial Therapy for HIV Infection in 1997, Journal of the American Medical Association, Vol. 277, No. 24 at 1962-69 (June 25, 1997)(describing scientific rationale for earlier initiation of more aggressive therapy and careful selection of initial drug regimen for optimal long-term clinical benefit); Douglas D. Richman, HIV Therapeutics, Science, Vol. 272 at 1886-87 (June 28, 1996); and Joan Stephenson, New Anti-HIV Drugs and Treatment Strategies Buoy AIDS Researchers, Journal of the American Medical Association, Vol. 275, No. 8 at 579 (February 28, 1996).

[12] Abbott, 107 F.3d at 939-41.

[13] Id. at 948. While the First Circuit left the door open for consideration of different facts, including those based on scientific developments, its decision, including by its construction of the Act's legislative history, still comes dangerously close to the application of a disability *per se* rule for HIV-disease.

including HIV, if only to establish that the law can adjust to such developments.[14]

CONCLUSION

The American Dental Association appreciates the opportunity to bring to this Court's attention issues pertaining to the Americans with Disabilities Act that are of paramount importance, in order to provide clear guidance to health care practitioners about their obligations to treat individuals with asymptomatic HIV-disease, particularly where those individuals claim "disability" status solely by virtue of an asserted inability to reproduce. We urge the Court to: (1) resolve the split in the circuit courts by holding "reproduction" is not a "major life activity" under the Act and (2) determine that the Act does not confer *per se* disability status on any condition, including HIV. The Court's resolution of these issues will, we trust, begin to clarify the determination of what is a disability under the Act.

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[14] In anticipation of briefs by others on the question this Court reserved in Arline, we urge the Court to consider that it would be difficult, if not impossible, to hold contagiousness alone can confer disability status by singling out HIV as a *per se* disability. If HIV-disease is a *per se* disability, why not hepatitis B, hepatitis C and tuberculosis? Beyond infection diseases, what of chronic conditions such as arthritis, multiple sclerosis and lupus? The fact that one's body cannot ameliorate the condition, or that the infection can be transmitted to others, has not previously persuaded this Court, or the lower courts, to abandon the statutory requirement for an individualized inquiry into whether a person's impairment substantially limits one or more major life activities.

Respectfully Submitted,

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